SUPREME COURT, U.S.
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No. _____

In the
SUPREME COURT of the UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

VINCENT McFADDEN,
Respondent.

On Petition for Writ of Certiorari To The Missouri Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. In reviewing a *Batson* challenge, can an appellate court disregard the holding of *Purkett v. Elem*, 514 U.S. 765 (1986), and determine – based on unsubstantiated assertions of defense counsel – that a particular fashion statement or hair style is common among members of a particular race and, thus, that a peremptory strike based on a person's "crazy red hair" is not race-neutral and is, in fact, indicative of racial discrimination?

2. Where one of the aggravating circumstances supporting a jury's death sentence verdict is a murder conviction that was subsequently reversed, can an appellate court disregard *Romano v. Oklahoma*, 512 U.S. 1 (1994), and overturn the death sentence based on the mere possibility that the jury may have been affected by the knowledge that the respondent was already under a sentence of death for the subsequently invalidated conviction, particularly when it was the respondent who introduced the subject of the previous death sentence to the jury and the State did not unduly emphasize that information during the penalty phase of the trial?

PARTIES TO THE PROCEEDING

The petitioner, State of Missouri, was the respondent below. The respondent, Vincent McFadden, was the appellant.

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The opinion of the Missouri Supreme Court reversing the trial court's judgment and sentence, filed March 20, 2007, and reported at 216 S.W.3d 673 (Mo. 2007), is reprinted in the Appendix ("App.") at A2-A27.

JURISDICTION

The Missouri Supreme Court entered its judgment on March 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment V:

> No person shall be . . .deprived of life, liberty or property without due process of law . . . .

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Amendment XIV, § 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to

any person within its jurisdiction the equal protection of the laws.

INTRODUCTION AND STATEMENT

1. This case turns on the use of a peremptory challenge to remove a venireperson who had distinguished herself by dying her hair "a color of red brighter than the ink that comes out of a red pen or marker." *See* App. at A13.

At the close of voir dire, the State used four of its nine peremptory challenges to remove African-American venirepersons from the panel, and one peremptory challenge to remove an Asian-American. The respondent raised a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), asserting that the State's strikes were motivated by purposeful racial discrimination. (In Missouri, to initiate a *Batson* hearing, the defendant need only identify the racial group of the stricken venirepersons – there is no additional showing that is necessary at that point.) The State responded with race-neutral reasons for each strike. The respondent was then given the opportunity to prove that the State's reasons were pretextual.

After hearing the State's race-neutral explanations, the respondent waived his *Batson* challenges as to two of the stricken venirepersons. But the respondent did present arguments as to the other three venirepersons, and the prosecutor responded. The trial court then evaluated the State's reasons, considered the respondent's arguments and concluded – based on the court's review of case law and of portions of the voir dire transcript, on the court's long experience with the prosecutor, and on the court's own observations of the voir dire proceedings – that the strikes were not motivated by racial discrimination.

More specifically, when challenged for his strike of venireperson S.H., the prosecutor said that he struck her because of her "crazy-looking red hair," because she did not have a driver's license, and because her demeanor in the death-qualification portion of the voir dire "appeared to me to be hostile to the – at least to the process, if not to me personally." (Tr. 950). The prosecutor described S.H.'s hair as "a color of red brighter than the ink that comes out of a red pen or a marker." (Tr. 950). He later elaborated that in regards to S.H.'s hair, he felt that she was trying to set herself apart from the crowd and that, "I don't need somebody with – that has some sort of weird or crazy attitude towards her appearance to be getting back in the jury." (Tr. 963). The prosecutor also acknowledged that lack of a driver's license was not a major factor by itself, but when combined with S.H.'s appearance and her demeanor during voir dire, he did not think that she would ever return a verdict of death. (Tr. 966).

In overruling the *Batson* challenge, the trial judge noted that he observed S.H. to be "very offended" by the prosecutor's questions about her lack of a driver's license. (Tr. 968). The judge also noted that S.H.'s red hair "does distinguish her and makes her separate from the crowd, and very individualistic. And Mr. Bishop [the prosecutor] from his prosecutorial experience does not necessarily want that on a jury." (Tr. 973). The trial judge also observed that he had "tried probably seven to ten cases with Mr. Bishop over a five and a half year period. Mr. Bishop, in fact, has avoided on many occasions attempting to even get into a Batson type challenge area . . . [a]nd he shows no racial animus . . . in this case, nor any other cases." (Tr. 969-70).

At the conclusion of the trial, the jury found the existence of several statutory aggravating circumstances beyond a reasonable doubt and returned a sentence of death. (L.F. 391-92). Those aggravating circumstances were respondent's conviction on April 22, 2005, of murder in the first degree and armed criminal action for killing Todd Franklin; and his conviction on February 4, 2005, for two counts of assault in the first degree and two counts of armed criminal action that were unrelated to the Franklin murder. (L.F. 391-92). The jury first learned that the conviction on the Todd Franklin murder carried a death sentence when defense counsel brought up the subject during the voir dire. (Tr. 195, 262, 324, 404, 474, 523, 578, 638, 699, 748). On May 16, 2006, the Missouri Supreme Court overturned the murder and armed criminal action convictions and the sentence of death for the murder of Todd Franklin. *State v. McFadden*, 191 S.W.3d 648, 650 (Mo. 2006). The trial court sentenced the respondent in this case eight days later, on May 24, 2006. (L.F. 9).

2. On appeal, a five-judge majority of the Missouri Supreme Court concluded that the State had engaged in purposeful racial discrimination in the peremptory strike of S.H. App. at A5, A7. The majority stated that it was "dubious" whether the State's explanation was race-neutral, asserting that "defense counsel refuted the State's conclusion that S.H.'s hair color was crazy and noted that S.H. was neatly dressed." App. at A6. The majority accused the State and the trial court of presuming to identify difference from a "limited cultural view." App. at A7. The majority also characterized the prosecutor's

belief that S.H. appeared hostile as a "misperception." App. at A7.

The majority also found that respondent's sentence was invalid because it rested on an invalid aggravating circumstance, namely, the subsequently overturned convictions for the Todd Franklin murder. App. at A11. The majority stated that it "[could not] assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that McFadden was already sentenced to death." App. at A11.

Two judges dissented, concluding, based on *Purkett v. Elem*, 514 U.S. 765 (1995), that the venireperson's red hair was "indeed a race-neutral explanation." App. at A25. The dissenters set forth in detail the prosecutor's explanations for exercising the strike and the trial court's explanation for upholding the strike, and concluded that it was "clear from the record that the prosecutor and judge went to great lengths to follow the letter of the law regarding *Batson* procedures and to assure that the peremptory strike was free of racial bias." App. at A25.

Finding that the concern over S.H.'s appearance was a race-neutral reason, the dissenters concluded that "the majority gives nothing but lip service to the fundamental tenets of *Batson* jurisprudence 'that peremptory strikes are subjective, and great reliance is placed on the trial court's assessment of the legitimacy of the State's explanation.'" App. at A26.

The dissenters did concur with the majority that respondent was entitled to a new penalty phase

trial because of the admission of evidence that he had been convicted of an earlier murder. App. at A27. The dissenters found that reversal of that conviction mandated reversal in the instant case. App. at A27.

REASONS FOR GRANTING THE WRIT

I. In holding that the prosecutor's reason for striking Venireperson S.H. was neither race-neutral nor "legitimate," the Missouri Supreme Court departed from the holding of *Purkett v. Elem*, where this Court made plain that hair style is not a characteristic peculiar to any race.

In *Purkett v. Elem*, the Court summarized the basic steps that must be followed when a claim of racial discrimination is raised regarding the exercise of peremptory challenges. "Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two)." *Purkett v. Elem*, 514 U.S. 765, 766 (1995). "If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." *Id.*

The Court has repeatedly stressed that a race-neutral explanation means an explanation based on something other than the race of the juror. *Hernandez v. New York*, 500 U.S. 352, 360 (1991). Indeed, "Unless a discriminatory intent is inherent

in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.*

Thus, in *Purkett v. Elem*, in considering whether a juror's beard and unkempt hair could form the basis for a peremptory strike, the Court held that "the prosecutor's proffered explanation in this case – that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard – is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike." 514 U.S. at 769. The Court observed that neither the wearing of beards nor the growing of long, unkempt hair were characteristics that were peculiar to any race. *Id.*; *see also Hernandez*, 500 U.S. at 361 (concluding that striking bilingual jurors for fear they would not accept the official court translator's rendition of Spanish-language testimony did not rest on stereotypical assumptions about Hispanics or bilinguals). The Court did not ask whether such an unusual appearance might be more common among those of one race than among those of another, nor did the Court suggest that such an inquiry would be appropriate.

In the respondent's case, the Missouri Supreme Court ignored *Purkett* and stated: "whether the State's explanation is race-neutral to begin with is dubious." App. at A6. The Court then recited defense counsel's more positive perception of S.H.'s appearance, and concluded that the prosecutor's contrary perceptions were "far from neutral." App. at A7. And, finally, having concluded that the explanation was not race-neutral, the Court concluded that the prosecutor's explanation was not "legitimate," and that it was "merely a pretext to

exercise a peremptory strike for racially discriminatory reasons." App. at A7.

But in reaching these conclusions, the Missouri Supreme Court did not explain how a person's "crazy red hair" is anything other than race neutral. Instead, the Missouri Supreme Court concluded that defense counsel had "refuted the State's conclusion that S.H.'s hair color was crazy." App. at A6. Defense counsel had apparently "refuted" the prosecutor's conclusion by explaining that "S.H.'s hair color, though perhaps uncommon among the prosecutor's acquaintances, was quite fashionable in the African-American community." App. at A5.

In short, the Missouri Supreme Court simply uncritically accepted the assertions of defense counsel both at trial and on appeal that S.H.'s hair color was "quite fashionable" in the African-American community. *See* App. at A5. But even if that assertion is true, the standard set by this Court is whether the juror was being struck for a characteristic peculiar to her race – not whether the characteristic is sometimes exhibited by members of her race. *Purkett*, 514 U.S. at 769. And, here, no showing was made to the trial court or to the Missouri Supreme Court that only African-American women dye their hair bright red. Indeed, S.H. herself, in an interview given after the Missouri Supreme Court issued its opinion, questioned why her hair color was an issue, noting that "white people have red hair." Robert Patrick, *Red Hair: Why's that a Problem?*, St. L. Post-Dispatch, Mar. 23, 2007, at D11. App. at A29.

In accepting defense counsel's assertion that bright red hair is "quite fashionable" among African-

Americans, it was the Missouri Supreme Court, and not the prosecutor, that allowed an unsubstantiated stereotype (or "a limited cultural view") to influence its decision. That simply does not square with *Purkett v. Elem* and numerous other cases that have declined to attach racial significance to non-racial characteristics. *See United States v. Roan Eagle*, 867 F.2d 436, 441-42 (8th Cir. 1989) (rejecting an argument that a peremptory strike of a Native American for being "slovenly" was essentially racist).

And it places appellate courts in a position not contemplated in *Batson*. There the Court noted, "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986).

Here, the Missouri Supreme Court gave no deference to the trial court's findings, and, instead, the Court determined that defense counsel had "refuted" the prosecutor's reasoning with the assertion that bright red hair is "quite fashionable in the African-American community." App. at A6. In short, without even mentioning *Purkett v. Elem*, the Missouri Court simply applied a racial gloss to a physical characteristic that this Court has previously deemed to be race neutral. If such a rule is allowed to stand, and if it is adopted by other states, the scope of *Batson* will be greatly expanded and the ability of attorneys to exercise peremptory strikes will be significantly impinged. Appellate courts will be free to decree virtually any characteristic used to justify a peremptory strike as a surrogate for racial discrimination. All that a defendant's lawyer will have to do is to make a credible assertion that a

characteristic that is uncommon even among members of a particular race is accepted to a greater degree in that race than it is in another – not that the characteristic is unusual to that race. And the only necessary evidence to support such a conclusion can be something as insubstantial as defense counsel's assertions at trial.

Thus, for instance, a person who watches basketball on television might conclude that tattoos are an acceptable fashion statement among African-Americans. Under the Missouri Supreme Court's analysis, peremptorily striking an African-American juror for having numerous prominent tattoos covering his body could then be deemed racial discrimination because tattoos are "fashionable in the African-American community." But, of course, such a limited cultural view overlooks the fact that such tattoos are also fashionable among some Caucasians – just as brightly dyed hair (including red or orange hair) is also fashionable among some segment of the Caucasian population.

In short, the standard used by the Missouri Supreme Court will permit a finding that a strike based on a certain characteristic is discriminatory, absent any evidence that the attorney making the strike considered the characteristic to be racial in nature. But *Batson* seeks to prevent *purposeful* racial discrimination in the selection of a jury. *Batson*, 476 U.S. at 86 (emphasis added). The *Batson* analysis is designed to assess the prosecutor's motive in making peremptory strikes. *Id.* at 97, 98. And by finding a facially race-neutral explanation to be discriminatory, the Missouri Supreme Court disregarded any consideration of the prosecutor's

actual beliefs and motives, and instead adjudged the case solely through the prism of its own perceptions.

II. The Missouri Supreme Court, in conflict with *Romano v. Oklahoma*, reversed the respondent's death sentence based on speculation that the jury's knowledge of respondent's death sentence in another case affected the jury's weighing process and made it more likely to impose the death penalty.

Two of the six statutory aggravating circumstances that the jury found beyond a reasonable doubt were the respondent's prior convictions for murder in the first degree and armed criminal action in the shooting death of Todd Franklin. (L.F. 391-92). Those two aggravating circumstances were rendered invalid when the Missouri Supreme Court reversed and remanded respondent's conviction in the Todd Franklin murder. *State v. McFadden*, 191 S.W.3d 648, 650 (Mo. 2006).

In *Brown v. Sanders*, 126 S. Ct. 884 (2006), the Court stated the test for determining when the presence of an invalid aggravating circumstance requires reversal:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer

> to give aggravating weight to the same facts and circumstances.

Id. at 892 (emphasis in original). The Court went on to explain that no constitutional error occurs where evidence supporting the invalidated factor is properly admitted, and the jury can give aggravating weight to that same evidence under the rubric of some other, valid aggravating factor. *Id.*

The State in this case presented evidence of Todd Franklin's murder separate and apart from the fact of the conviction and sentence that was subsequently reversed. In Missouri, unadjudicated bad acts are admissible as non-statutory aggravating circumstances, so the prosecutor's ability to present that evidence to the jury was not dependant on the fact of the prior conviction. *State v. Ferguson*, 20 S.W.3d 485, 500 (Mo. 2000); *State v. Kinder*, 942 S.W.2d 313, 331 (Mo. 1996). Therefore, the jury could properly give aggravating weight to that evidence as a non-statutory circumstance, thus meeting the *Brown* standard.

The Missouri Supreme Court nonetheless found that even if the evidence was admissible as non-statutory aggravating prior bad acts, it could not assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that respondent already faced a death sentence. App. at A11. In so ruling, the Missouri Supreme Court acted in contradiction to this Court's holding in *Romano v. Oklahoma*, 512 U.S. 1, 14 (1994). *Romano* also involved admission of evidence of a prior death sentence that was later invalidated. *Id.* at 3, 5. The defendant in that case argued that admission of his prior death sentence diminished the sentencing

jury's sense of responsibility. *Id.* at 9. The Court rejected that argument, finding that it was impossible to know how evidence of the prior death sentence affected the jury. *Id.* at 14. The Court stated that it was equally plausible that the evidence could have made the jury more inclined to impose a death sentence, or less inclined to do so. *Id.* As a result, a holding that admission of the evidence rendered the sentencing proceeding fundamentally unfair "would . . .be an exercise in speculation, rather than reasoned judgment." *Id.* The Missouri Supreme Court engaged in exactly the type of speculation condemned by this Court in *Romano* to reach a result that conflicts with that decision.

This case also raises the question of whether a criminal defendant is entitled to reversal due to the jury's knowledge of an invalidated death sentence, when it was defense counsel who injected the subject into the case. The jury first learned about the previous death sentence during defense counsel's questioning in the small group voir dire on death qualification. (Tr. 195, 262, 324, 404, 474, 523, 578, 638, 699, 748). The State's only mention of the previous death sentence was one brief reference during the penalty phase opening statement, and the admission of a court document that was read to the jury, setting out the fact that the respondent was sentenced to death for Todd Franklin's murder. (Tr. 1268, 1291). The Missouri Supreme Court's decision implies that a jury's knowledge of an invalidated death sentence is *per se* prejudicial, regardless of which party brought the information before the jury, placing the decision even further at-odds with the precedents cited above.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

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